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In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 715

STATE OF OKLAHOMA AND CHAMPLIN REFINING COMPANY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The district court did not write an opinion; that court's views are reflected in its conclusions of law at R. 62–67. The opinion of the circuit court of appeals (R. 141–150) is reported at 156 F. 2d 769.

JURISDICTION

The judgment of the circuit court of appeals (R. 150) was entered on July 29, 1946. A petition for rehearing was denied on August 29, 1946 (R. 151–161). The petition for a writ of certiorari was filed on November 25, 1946, and

was granted on January 20, 1947 (R. 161). The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code, as amended.

QUESTIONS PRESENTED

1. Whether a State, upon its admission into the Union, acquires title to the bed of a river within its borders which is admittedly nonnavigable in fact by virtue either (a) of a subsequent determination by a state court, made in a case to which neither the United States nor its riparian Indian allottees were parties, that the river is navigable, or (b) by a subsequent assertion of title to such river bed by the state legislature.

2. Whether trust patents issued to restricted Indian allottees before the creation and admission of a State into the Union, expressly conveying riparian lands bounded by a river nonnavigable in fact, but silent with respect to the river bed, also vested title to the bed, adjacent to the trust allotments, to the thread of the river, and, if so, whether such vested title of the United States and its riparian allottees could be divested by subsequent state judicial determination of navigability or legislative assertion of title.

STATUTES INVOLVED

Section 4173 of the Acts of the Oklahoma Territory of 1890 reads as follows:

> * * * In all cases, where the opposite banks of any streams not navigable belong

to different persons, the stream and the bed thereof shall become common to both.

The Act of the Oklahoma Legislature of May 28, 1919, 64 O. S. A. section 290, reads as follows:

> The Commissioners of the Land Office are hereby authorized to lease for oil and gas purposes all lands between mean high water mark in all streams or rivers of two chains or over; all such streams are declared the property of the State of Oklahoma.

STATEMENT

The judgment (R. 150) here being reviewed reversed the judgment of the trial court in favor of petitioners, State of Oklahoma and Champlin Refining Company (R. 67), and adjudged that the United States, under trust patents issued to Indian wards covering riparian tracts on the south bank of the Arkansas River in Oklahoma, also holds title to the south half of the river bed adjacent to the allotted riparian tracts in trust for its Indian wards. The facts are not in dispute.

The United States originally acquired title to the land in suit as a part of the Louisiana Purchase in 1803. Under treaties of May 6, 1828, 7 Stat. 311, February 14, 1833, 7 Stat. 414, and December 29, 1835, 7 Stat. 478, the United States conveyed to the Cherokee Nation, by deed of December 31, 1838, a large tract of land, including the land on both sides and the bed of the Arkansas

River at the locations in suit (Fdgs. III (a) and (b), R. 57; Deft.'s Ex. 1 C, R. 118–124). By treaty of July 19, 1866, 14 Stat. 799, the Cherokee Nation agreed that the United States might settle friendly Indians upon that part of the Cherokee lands known as the Cherokee Outlet. Article XVI of that treaty provided that such lands would be conveyed to the Indians so settled. (Fdg. III (c), R. 57–58.) This article covered Cherokee lands west of 96°, and therefore included the lands in question. By treaty of October 28, 1867, 15 Stat. 593, 594, a reservation was set aside for the Cheyenne and Arapahoe Indians between the Cimarron and Arkansas Rivers. This reservation, which embraced the lands here in suit, was expressly extended to the middle of the Arkansas River. The Cheyenne and Arapahoe Indians declined this reservation and relinquished their claim. H. R. Ex. Doc. No. 89, 47th Cong. 1st sess. (Fdg. III (d), R. 58).

On June 5, 1872, 17 Stat. 228, Congress authorized the Cherokee Nation to convey to the Osage Nation a tract of land described as:

> Bounded * * * on the south and west by the north line of the Creek Country and the main channel of the Arkansas River * * *.

(Fdg. III (e), R. 58). This grant included the land on the opposite side of the river at approximately the location of the tracts in question

(R. 62), and the title of the United States in trust for the Osage Nation to the north half of the river bed was upheld in subsequent litigation between the United States and the State of Oklahoma. *United States* v. *Brewer-Elliott Oil & Gas Co. et al.*, 249 Fed. 609 (W. D. Okla.), affirmed, 270 Fed. 100 (C. C. A. 8), affirmed, 260 U. S. 77.

The land on both sides of the Arkansas River at the location in question was first surveyed into sections, townships, and ranges in September 1872, the survey being approved on September 16, 1872 (Fdg. VI, R. 61, Deft.'s Exs. 7 and 8, not printed in the transcript of the record but on file in the office of the Clerk of this Court). Two of the riparian tracts involved are in Township 23 North, Range 4 East of the Indian Meridian (Fdg. IV (a) and (b), R. 59–60) and these tracts are held in trust for Pawnee Indians (Pltf.'s Exs. A and 2, R. 100–103). The other two tracts are located in Township 23 North, Range 3 East of the Indian Meridian (Fdg. IV (c) and (d), R. 60–61), and these tracts are held in trust for the Otoe Indians (Pltf.'s Exs. 3 and 4, R. 103–106). The history of the Otoe and Pawnee allotments is not the same and they, therefore, require separate notice.

With respect to the Otoe allotments, that history is as follows: Under the 1866 treaty with the Cherokees, and pursuant to authority contained in

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the Act of March 3, 1881, 21 Stat. 380, the Secretary of the Interior designated and assigned for the use and occupation of the Confederated Otoe and Missouria Tribes of Indians the following:

> that portion of Tp. 23, N. R. 3 E. lying west of the Arkansas River * * *

Other townships not here involved were also included (Fdg. III (f), R. 58; Pltf.'s Ex. 5, R. 106–107). Pursuant to the 1866 treaty with the Cherokees, and in conformity to the Act of March 3, 1883, 22 Stat. 603, 624, the Cherokee Nation, on June 14, 1883, conveyed to the United States in trust for the use and benefit of the Otoe and Missouria Indians:

> Fractional township twenty-three (23) North, range three (3) East of the Indian Meridian; lying and being on the right bank of the Arkansas River, according to a plat of said lands hereto annexed, marked "A", and made a part of this conveyance * * *.

The plat accompanying the deed shows this fractional township as bounded on the north by the Arkansas River. Other townships not here involved were also included (Fdg. III (g), R. 58–59; Pltf.'s Ex. 7, R. 111–114a). On November 24, 1906, a trust patent was issued to Ethel Lewis Barnes, an Indian of the Otoe and Missouria Tribes, covering the following described land:

> the South half and the North East quarter of the South East quarter and the Lot num-

> bered five of Section twenty-four, in Township twenty-three North of Range three East, of Indian Meridian in Oklahoma, containing one hundred and fifty-two acres and twenty hundredths of an acre.

Title to said tract is now held by the United States in trust for Ethel Lewis Barnes (Fdg. IV (c), R. 60; Pltf.'s Ex. 3, R. 103–104). On June 10, 1907, a trust patent was issued to Anna Robedeaux, an Indian of the Otoe and Missouria Tribes, covering the following described land:

> * * * Lot numbered six of Section twenty-four in Township twenty-three North of Range three East of the Indian Meridian in Oklahoma, * * *.

Title is now held by the United States in trust for ten named heirs of Anna Robedeaux (Fdg. IV (d), R. 60; Pltf.'s Ex. 4, R. 105–106). Both of these allotments are bounded by the Arkansas River, as shown by the plat at R. 32a.

With regard to the Pawnee allotments in Township 23 North, Range 4 East of the Indian Meridian, the following is the history:

By Section 4 of the Act of April 10, 1876, 19 Stat. 28, 29, there was set aside as a reservation for the Pawnee Tribe of Indians, in accordance with the 1866 treaty with the Cherokees, the following described land:

> All that tract of country between the Cinnarron [Cimmarron] and Arkansas Rivers embraced within the limits of townships

> * * * twenty-three, * * * of range four east, * * * of the Indian Meridian.

Other townships not here involved were included in the reservation (Fdg. III (h), R. 59).[1] In accordance with the 1866 treaty with the Cherokees and pursuant to the provisions of the Act of March 3, 1883 (22 Stat. 603, 624), the Cherokee Nation on June 14, 1883, conveyed to the United States in trust for the use and benefit of the Pawnee Tribe of Indians, in addition to many townships not here involved, the following described land:

> * * * fractional townships twenty three (23) * * * north, range four (4) east: * * *, According to a plat of said lands hereto annexed, marked "A", and made a part of this conveyance * * *.

The plat accompanying this deed shows the fractional township as bounded on the north by the Arkansas River (Fdgs. III (c) and III (i), R. 57, 59; Pltf.'s Ex. 6, R. 107–110a). By agreement between the Pawnee Tribe and the United States, dated November 23, 1892 (I Kappler, *Indian Affairs, Laws and Treaties*, pp. 496–498), the Pawnee Tribe ceded and relinquished to the United States its beneficial interest in the reservation lands. Article II of the agreement pro-

[1] In its finding III (h), the trial court inadvertently named Range 3, whereas the proper designation is Range 4.

vided for the making of allotments to individual Pawnee Indians. In the Act of March 3, 1893, 27 Stat. 612, 644, which Act implemented that agreement, Congress provided in Section 12 for payment to the Pawnee Tribe of the sum of $80,000 for the cession; money was also provided for the expense of making the allotments "provided for in said agreement."

Thereafter, on October 9, 1893, there was issued to Horace Field, a Pawnee Indian, a trust patent covering the following described lands:

> The South East quarter of the North West quarter, and the Lots numbered one, two and three of Section nineteen in Township twenty-three North of Range four East of the Indian Meridian, in Oklahoma Territory, containing one hundred and twenty-one acres and sixty-six hundredths of an acre.

Title is now held by the United States in trust for four named heirs of Horace Field (Fdg. IV (a), R. 59; Pltf.'s Ex. 2, R. 102–103). Also, on October 9, 1893, a trust patent was issued to William Bayhylle, a Pawnee Indian, covering the following described land:

> The west half of the northeast quarter of section twenty and the southwest quarter of the southeast quarter and the lot numbered six of section seventeen in Township twenty-three north of Range four east of the Indian Meridian, Oklahoma Territory

containing one hundred and twenty-nine acres.

Title is now held by the United States in trust for eight named Indian heirs of the allottee (Fdg. IV (b), R. 60; Pltf's Ex. A, R. 100–101). These two Pawnee allotments are also bounded by the Arkansas River, as shown on the plat appearing at R. 32a.

All four of the trust allotments were issued under Section 5 of the General Allotment Act of February 8, 1887, 24 Stat. 388, and the trust period has been extended by Executive Orders, as provided therein (Fdg. IV, R. 61).

The State of Oklahoma was admitted to the Union on November 16, 1907 (Fdg. VIII, R. 61), so that all of the allotments were made prior to the existence of the State.

On July 20, 1942, the State of Oklahoma executed two oil and gas leases in favor of petitioner Champlin Refining Company, covering the south half of the Arkansas River bed for a considerable distance including the area adjoining the four Indian allotments already set out, and the Champlin Refining Company has drilled one well which is producing in commercial quantities (Fdg. X, R. 62; Pltf's Exs. A and B, R. 13–20). The areas covered by these leases and the location of the well are shown on the plat at R. 32a.

On July 13, 1943, the United States began the instant proceeding by filing its complaint against the Champlin Refining Company, a New Mexico

corporation (R. 1–13).[2] In that complaint, the Government pleaded the various grants, reservations, conveyances, and allotments hereinbefore set forth. The complaint stated that under the lands held in trust by the United States for its allottees or their heirs, there were valuable mineral deposits consisting of oil and gas; that the State of Oklahoma on July 20, 1942, had executed the two leases hereinbefore noted in favor of the defendant Champlin Refining Company, which leases covered the portions of the south half of the Arkansas River bed opposite the allotments; and that said leases were given without the authority of the United States, the allottees, the heirs of the allottees, or the Secretary of the Interior. It was further alleged that the Arkansas River at the points in question was not a navigable stream at the time Oklahoma was admitted to the Union, and that the river at those points had been determined to be non-navigable in the case of *Brewer-Elliott Oil and Gas Company* v. *United States*, 260 U. S. 77 (1922); that, under the leases, the defendant claimed rights to the oil and gas under the bed of the river and within the boundaries of the allotments, and that the defendant was threatening to begin prospecting for oil and gas within the boundaries of said allotments. The Government asserted

[2] Champlin Refining Company, an Iowa corporation, was also made a defendant, but that corporation filed a disclaimer of interest and was eliminated from the case (R. 21).

that the State of Oklahoma had no proprietary title or interest in the bed of the Arkansas River and was without power to confer by leases or otherwise any title or interest in those portions of the river bed adjoining the allotments, that defendant was trespassing, and that the leases (attached as Exhs. A and B to the complaint) had been recorded and constituted a cloud upon the title of the United States, its allottees, and heirs of the deceased allottees. The complaint prayed that the defendant be enjoined from trespassing upon the river bed and drilling for minerals thereunder, that the leases be cancelled, that the defendant be enjoined from asserting any title to the river bed and that title be quieted in the United States, its allottees and the heirs of deceased allottees.

On August 5, 1943, the Champlin Refining Company filed an answer (R. 21–22) and the State of Oklahoma subsequently filed an answer (R. 24–26), the State having been granted leave to intervene by order of August 20, 1943 (R. 24). The answers of these two parties as amended (R. 27–28) admitted execution of the oil and gas leases but alleged, in effect, that the State of Oklahoma was the owner of the river bed included in the leases because the river bed became the property of the State upon its admission to the Union. It was further alleged that the United States Supreme Court had sustained the right of

the State of Kansas to declare its rivers to be navigable, that Kansas had declared the Arkansas River to be navigable within its boundaries, and that the State of Oklahoma would be denied equal protection of the laws guaranteed by the Federal Constitution if the claim of the United States were sustained.

On October 15, 1943, pretrial proceedings were had (R. 75–95).[3] In connection with their amended answers, the defendants introduced as Exhibit 15 (R. 139–140) an affidavit by one Hawkins, Chairman of the Kansas Board of Administration, to the effect that Kansas is the owner of the bed of the Arkansas River in that State and has executed oil and gas leases and collected rents and royalties. This exhibit was admitted over the objection of the United States that it was immaterial (R. 89–90). On November 19, 1943, the United States filed its motion for summary judgment (R. 29) but this motion was denied on August 8, 1944 (R. 35).

The case came on for trial on September 16, 1944 (R. 95–100). At that proceeding, a stipulation was executed to the effect that it shall be considered that the United States has introduced evidence showing that the Arkansas River is not

[3] The State of Oklahoma had denied the allegations as to the chain of title, the allotments made to individual Indians and the extension of the trust periods thereon. At the pretrial hearing, the Government introduced evidence to sustain its allegations.

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navigable in fact at the places in question "on all material dates in this controversy"; the stipulation also provided that the defendants had introduced no evidence on that question and that they objected to such evidence on the ground that by reason of the decision in *State* v. *Nolegs*, 40 Okla. 479, 139 Pac. 943, such evidence was immaterial and irrelevant because that decision constituted a rule of property binding upon the court (R. 45–46, 96). In addition, the facts as above outlined were established by stipulation or exhibit, and certificates of the Chairman of the Board of Administration of the State of Kansas (R. 49–56) relative to drilling operations in that State were introduced in evidence over objection by the United States that they are irrelevant and immaterial (R. 98).

On December 21, 1944, the court filed its findings of fact and conclusions of law (R. 57–67). In addition to the findings already noted, the court found that in all of the reservations, grants, and conveyances, the bed of the river was neither expressly included nor excluded (Fdg. V, R. 61); that "the Arkansas River, at the points in question in this litigation and * * * at all times herein material, is not navigable in fact" (Fdg. VII, R. 61); that the Supreme Court of Oklahoma, in *State* v. *Nolegs*, 40 Okla. 479, 139 Pac. 943, took judicial notice of the fact that the Arkansas River is navigable throughout the State and that

the bed thereof is the property of the State (Fdg. VIII, R. 61); that the State of Oklahoma, by statute of May 28, 1919, 64 O. S. A. section 290, had declared that the beds of rivers within the State two chains or more in width are the property of the State, and that the Arkansas River, at the points here involved, is more than two chains in width (Fdg. IX, R. 61); that the Supreme Court of Kansas in *Hurst* v. *Dana,* 86 Kan. 947, had taken judicial notice that the Arkansas River was navigable within that State and that the State owned the river bed, and that Kansas had given leases upon the river bed and producing wells had been drilled therein (Fdg. XI, R. 62). The court concluded that the State had power to declare rivers navigable and so limit the title of riparian owners except where title to the river bed had been expressly granted by the United States prior to statehood, and that the decision in *State* v. *Nolegs,* 40 Okla. 479, 139 Pac. 943, is the binding and controlling rule of law in this case (Concl. II, R. 66); it further concluded that the State of Oklahoma is the legal owner of the river bed at the points in question, that Champlin Refining Company has a valid lease on such lands (Concl. III, R. 66), and that the United States, in behalf of its restricted wards, has no right, title or interest in or to such portions of the river bed as are here involved (Concl. IV, R. 66–67). A decree was entered to this effect

(R. 67)[4] from which the United States appealed (R. 68).

The Circuit Court of Appeals held (R. 141–150) that title to the beds of nonnavigable rivers remains in the United States after the admission of a new State to the Union; that the question of navigability is a federal question and that navigability in fact is the test in law; that under the trust patents issued prior to the formation and admission of the State of Oklahoma to the Union, title to the bed of the river at the points in issue vested in the United States in trust for the Indian allottees, and that Oklahoma could not adopt a retroactive rule for determining navigability which would destroy that title. Accordingly, that court reversed the judgment of the trial court and remanded the case with instructions to enter judgment for the Government (R. 150).

SUMMARY OF ARGUMENT

I

The United States acquired the lands in question under the Louisiana Purchase. No express grant either of the river bed or of the riparian

[4] On June 26, 1944, a stipulation was filed providing that in the event of a decision adverse to the claim by the United States of title as trustee for its Indian wards, neither of the defendants would plead the judgment as *res judicata* in any subsequent proceedings brought by the Government on a claim of title in itself (R. 34). In view of this stipulation, the trial court limited its conclusions to passing upon the Government's claim on behalf of the allottees (R. 65) and

tracts has been made to the State of Oklahoma. That State's claim to title, therefore, rests entirely upon the contention that the title passed to Oklahoma by operation of law upon its admission to the Union.

A. It is undisputed that a new State upon its admission does not thereby acquire the beds of nonnavigable streams. And it is well settled that whether or not a stream is navigable for this purpose is a federal question and that the federal rule applies the test of navigability in fact. Since the Arkansas River has been found by both courts below and is conceded by petitioners to be nonnavigable in fact, Oklahoma did not acquire title thereto upon its admission.

B. Petitioners' argument that a state court decision holding the river to be navigable, contrary to the fact, and a state legislative assertion of ownership of the river bed, are conclusive in this litigation is erroneous since the question of navigability is a federal question. Moreover, this exact contention has been rejected by this Court more than once. *Oklahoma* v. *Texas*, 258 U. S. 574; *Brewer Oil Co.* v. *United States*, 260 U. S. 77; *United States* v. *Oregon*, 295 U. S. 1. *Wear* v. *Kansas*, 245 U. S. 154, does not support their contention.

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the third paragraph of the decree dismissed this claim (R. 67). Thus, the second paragraph of the decree simply sustains the State's title as against the claim of the United States as trustee for the allottees.

C. The notion of petitioners that the mere execution of trust patents to the Indians embracing riparian lands, which petitioners say did not include lands in the river bed, operated as a grant to the State of title to the river bed is unsupportable. *United States* v. *Oregon*, 295 U. S. 1, 27. Hence, it is no concern of petitioners whether, as the United States concedes, the trust patents conveyed the river bed to the Indians. There is clearly no distinction so far as the determination of navigability is concerned between a claim of the United States asserted on behalf of its Indian wards and one asserted on its own behalf. In *Oklahoma* v. *Texas*, 258 U. S. 574, the United States asserted and prevailed on both types of claims. The decision in *Brewer Oil Co.* v. *United States*, 260 U. S. 77, likewise denies the existence of any such distinction.

D. The claim of petitioners that the local decision has established a rule of property which is binding upon the federal courts plainly lacks merit since the fact is that the decisions of this Court have been recognized even by the Oklahoma courts as establishing a contrary rule of property with respect to the Arkansas River above its confluence with the Grand River.

II

As we have shown, whether or not the beneficial interest in the river bed passed to the Indian allottees under the trust patents or was retained by

the United States is irrelevant to the question of Oklahoma's property rights in the bed of the Arkansas River. However, the fact that, as we will show, the river bed was included in the trust patents is an additional reason why petitioners' position cannot be sustained.

A. Whether patents describing by survey descriptions lands abutting on non-navigable waters include under water lands is primarily a question of intent of the United States in making the grants. Under the circumstances of this case and particularly prior transactions relating to other Indians, it is clear that Congress, treating these Indians on a parity with others, intended that the allottees should have the river bed. Moreover, even if such intent did not so appear, the same result follows when the patents are construed with reference to the local law in effect at the time of the grants—the law of Oklahoma Territory. The conclusion that the trust patents here embraced the bed of the river follows *a fortiori* from this Court's decision in *Oklahoma* v. *Texas*, 258 U. S. 574, where the same result was reached as to patents issued after Oklahoma was admitted to the Union.

B. Since the allottees acquired a vested property right in the river bed at the times the patents issued, the subsequent admission of Oklahoma to the Union and the decision of its courts or declaration of its legislature thereafter could not divest such property right. *Brewer Oil Co.* v. *United*

States, 260 U. S. 77; *United States* v. *Oregon,* 295 U. S. 1. Such action by the State is also barred by Section 3 of the Oklahoma Enabling Act, 34 Stat. 267, 270.

ARGUMENT

I

THE STATE OF OKLAHOMA DOES NOT HAVE TITLE TO THE LANDS IN QUESTION

The lands in question became public domain when the United States acquired them as part of the Louisiana Purchase. The State of Oklahoma has no claim to the river bed at the points in question based upon an express grant of the United States, either of the bed itself, or as an incident of a grant to the State of riparian lands at the points in issue. Consequently, the State's sole reliance is upon the theory that "said lands became the property of the State of Oklahoma by operation of law upon its admission as a State" (Int. Answer, par. 13, R. 25; see also Br. 6).

A. *Since the Arkansas River was not navigable in fact, title to the bed thereof did not pass to the State of Oklahoma upon admission of the State to the Union.*—It is well settled that upon the admission of a State into the Union, "on an equal footing with the original States",[5] it acquires title to the beds of navigable rivers within the State. *Shively*

[5] Oklahoma Enabling Act, 34 Stat. 267, 271.

v. *Bowlby*, 152 U. S. 1, 26; *Scott* v. *Lattig*, 227 U. S. 229, 242; *Oklahoma* v. *Texas*, 258 U. S. 574, 583; *United States* v. *Holt Bank*, 270 U. S. 49, 54; *United States* v. *Oregon*, 295 U. S. 1, 14.[8] "But if the waters are not navigable in fact, the title of the United States to land underlying them remains unaffected by the creation of the new State." *United States* v. *Oregon*, 295 U. S. 1, 14; *United States* v. *Utah*, 283 U. S. 64, 75; *Brewer Oil Co.* v. *United States*, 260 U. S. 77, 87; *Oklahoma* v. *Texas*, 258 U. S. 574, 591. The United States "has never held its public lands in the territories under unnavigable waters under any such trust * * *." *Brewer-Elliott Oil & Gas Co.* v. *United States*, 270 Fed. 100, 109 (C. C. A. 8). The bed of such a stream is simply a part of the public domain. New States, upon their admission to the Union, do not acquire the public lands within their borders apart from an express grant of such lands by the United States, and there is nothing in the circumstance that land is under water to warrant any different rule with respect to the beds of nonnavigable streams.

It is equally well settled that when a State bases its claim to a river bed upon the principle applicable to navigable streams, the question of

[8] In *United States* v. *California*, No. 12 Original, this Term, the Government recognizes that this is an established principle and urges that it be reaffirmed as applied to cases involving navigable inland waters (Govt.'s Br. p. 143).

navigability is a federal question. In *United States* v. *Holt Bank, supra,* the court said (270 U. S. 49, 55):

> Both courts below found that the lake was navigable. But they treated the question of navigability as one of local law to be determined by applying the rule adopted in Minnesota. We think they applied a wrong standard. Navigability, when asserted as the basis of a right arising under the Constitution of the United States, is necessarily a question of federal law to be determined according to the general rule recognized and applied in the federal courts.

Again, in *United States* v. *Utah, supra,* the court stated (283 U. S. 64, 75):

> The question of navigability is thus determinative of the controversy, and that is a federal question.

And in *United States* v. *Oregon, supra,* it was said (295 U. S. 1, 14) that "Since the effect upon the title to such lands is the result of federal action in admitting a state to the Union, the question, whether the waters within the State under which the lands lie are navigable or non-navigable, is a federal, not a local one."

The federal rule or test of navigability was precisely stated in *Oklahoma* v. *Texas,* 258 U. S. 574. In rejecting certain matters there relied upon by the State of Oklahoma as evidence of navigability of the Red River, Mr. Justice Van Devanter, speaking for the court, said (p. 586):

> We find nothing in any of the matters relied on which takes the river in Oklahoma out of the settled rule in this country that navigability in fact is the test of navigability in law, and that whether a river is navigable in fact is to be determined by inquiring whether it is used, or is susceptible of being used, in its natural and ordinary condition as a highway for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.

The federal rule thus stated was applied in *United States* v. *Holt Bank,* 270 U. S. 49, 56, and in *United States* v. *Oregon,* 295 U. S. 1, 14.

In the *Brewer-Elliott* case, in which the State of Oklahoma intervened, it was determined that the Arkansas River is and always had been non-navigable in fact above its confluence with the Grand River. *United States* v. *Brewer-Elliott Oil & Gas Co.,* 249 Fed. 609, 623 (W. D. Okla.). The specific portions of the river bed there in suit are "at the approximate point on the stream" here involved (R. 62). This finding was affirmed by the circuit court of appeals and by this Court. 270 Fed. 100 (C. C. A. 8), 260 U. S. 77. And in the case at bar, the courts below have found that the Arkansas River "at the points in question in this litigation and * * * at all times herein material, is not navigable in fact" (Fdg. VII, R. 61). Petitioners concede this to be a correct

finding (Br. 3–4). It follows that the State of Oklahoma has no title to the river bed.

B. *The State of Oklahoma may not, by applying a local rule of navigability to a stream non-navigable in fact, appropriate to itself property vested in the United States or its grantees.*—Petitioners do not and cannot challenge the finding that the river is non-navigable in fact. They seek, however, to do so indirectly by the assertion that despite such finding, the river is to be treated in law as if it were navigable. They contend (Br. 11, 13) that a decision of the Supreme Court of Oklahoma in 1914 in the case of *State* v. *Nolegs*, 40 Okla. 479, 139 Pac. 943, holding by judicial notice that the Arkansas River is navigable in Oklahoma, fixes the character of the river and is binding upon all subsequent litigants, whether or not parties to the *Nolegs* case, and binding on federal courts, including this Court.

The contention is erroneous because, as we have shown, *supra*, pp. 21–23, the rights of the State are governed by the federal rule of navigability in fact. There is no decision supporting petitioners' view. Indeed, this is the third time that Oklahoma has made the argument, it having already been twice rejected by this Court. In *Oklahoma* v. *Texas*, 258 U. S. 574, relied upon by the Circuit Court of Appeals (R. 148), the United States and Oklahoma litigated title to the bed of the Red River. The Government there claimed the south half of the bed for itself, but its claim

to portions of the north half was made, as here, on behalf of Indian allottees to whom it had issued trust patents for riparian lands on the north bank (258 U. S. at p. 596). Contrary to petitioners' assertion (Br. 48–49), the patents involved in that case, like those here involved, did not expressly convey ownership to the thread of the stream. See *infra*, pp. 44, and 53. In *Oklahoma* v. *Texas*, as here, Oklahoma based its title to the bed of the Red River upon the claim that the river was navigable throughout its course in the State. This Court stated (p. 583) that "the real question in this connection is whether the river is navigable in Oklahoma." After stating that the settled rule in this country is that "navigability in fact is the test of navigability in law" (p. 586), this Court proceeded to examine the evidence on that subject. Among the matters relied upon by Oklahoma was a decision of the Supreme Court of Oklahoma in 1915, *Hale* v. *Record*, 44 Okla. 803, 146 Pac. 587, holding that the river was navigable in fact. This Court rejected the State's reliance upon the state court decision with the following language (258 U. S. at p. 591):

> A decision by the Supreme Court of Oklahoma, in *Hale* v. *Record*, 44 Okla. 803, is relied on as adjudging that the river is navigable in fact. The opinion in the case is briefly to the effect that in the trial court the evidence was conflicting, that the conflict was there resolved on the side of navi-

> gability, and that this finding had reasonable support in the evidence and therefore could not be disturbed. *It was a purely private litigation. The United States was not a party and is not bound* [citing *Economy Light & Power Co.* v. *United States*, 256 U. S. 113, 123]. There is in the opinion no statement of the evidence, so the decision hardly can be regarded as persuasive here. [Italics supplied.]

State v. *Nolegs*, 40 Okla. 479, 139 Pac. 943, here relied upon by petitioners, was likewise a private litigation. Neither the United States nor the allottees for whom it here sued were parties to it. Not only is the *Nolegs* decision not persuasive here, it is clearly erroneous under the finding of both courts below that the river is nonnavigable in fact, which finding petitioners concede to be correct (Br. 3–4). Moreover the *Nolegs* decision, as will be shown (pp. 28–29 *infra*), has previously been held to be erroneous and was rejected by the federal trial and appellate courts, and by this Court, twenty-five years ago in *Brewer Oil Co.* v. *United States*, 260 U. S. 77.

This Court in *Oklahoma* v. *Texas*, *supra*, after holding that the Red River was nonnavigable in fact, stated that (258 U. S. p. 591) "We conclude that no part of the river within Oklahoma is navigable and therefore that the title to the bed did not pass to the State on its admission into the Union," and Oklahoma was decreed to own only those portions of the river bed abutting shore

lands expressly granted to the State (258 U. S. pp. 596, 598). Thus the argument presently advanced by petitioners was flatly rejected by this Court.

The contention that a state judicial determination of navigability, even though erroneous, bound this Court was again rejected in *Brewer Oil Co.* v. *United States,* 260 U. S. 77. There the United States sued certain oil companies for itself and as trustee for the Osage Nation. The oil companies were removing oil from the bed of the Arkansas River adjoining the Osage Reservation, under leases from the State of Oklahoma. The Government claimed the river bed was owned by the tribe, and sought cancellation of the leases, injunctive relief, and asked that title be quieted in the United States as trustee. The State of Oklahoma intervened, claiming to own the river bed in fee. The trial court found the river was and always had been nonnavigable in fact above its confluence with the Grand River, and at the specific points in question here (R. 62), and that the river bed was conveyed to the Osages by a statute of 1872 which expressly fixed the boundary as "the main channel" of the river, 249 Fed. 609 (W. D. Okla.). The judgment in favor of the United States was affirmed by the Circuit Court of Appeals. 270 Fed. 100 (C. C. A. 8). In this Court, Oklahoma claimed that the Arkansas River was navigable. Relying upon language employed by this Court

in *Pollard's Lessee* v. *Hagan*, 3 How. 212, the State argued that the United States had no power to convey the bed under navigable waters and deprive the future State of ownership. Since in the later decision in *Shively* v. *Bowlby*, 152 U. S. 1, 47, this Court had stated that the United States could make such a grant for certain purposes, Oklahoma alternatively argued that the grant to the Osage Nation was not within the purposes named. This Court did not decide either question, since it found the river to be nonnavigable in fact.

Upon the issue of navigability, Oklahoma relied, as it now does here, upon the decision of the Supreme Court of Oklahoma in the *Nolegs* case. This Court noted that it had once previously rejected the State's contention, stating (260 U. S. at p. 87):

> But it is said that the navigability of the Arkansas River is a local question to be settled by the legislature and the courts of Oklahoma, and that the Supreme Court of the State has held that at the very point here in dispute, the river is navigable. *State* v. *Nolegs*, 40 Okla. 479. A similar argument was made for the same purpose in *Oklahoma* v. *Texas*, *supra*, based on a decision by the Supreme Court of Oklahoma as to the Red River. *Hale* v. *Record*, 44 Okla. 803. The controlling effect of the state court decision was there denied because the United States had not been there,

as it was not here, a party to the case in the state court. *Economy Light & Power Co.* v. *United States,* 256 U. S. 113, 123.

Thus, for the second time, petitioners' present contention was specifically rejected.

Petitioners rely heavily upon the decision in *Wear* v. *Kansas,* 245 U. S. 154, but that decision is no authority for the proposition that a state judicial determination, contrary to the fact, that a river is navigable, can operate to foreclose the title of the United States or its grantees to the bed of a nonnavigable river. There Wear claimed title to a portion of the bed of the Kansas River, his claim being based upon a federal grant of riparian land in 1860. Navigability in fact was apparently conceded on the pleadings, but he contended that under a territorial statute enacted in 1859, adopting the common law of England, the river was nonnavigable at the time of the grant by reason of the English rule that only tidal waters are navigable, and that under the local law, consequently, his grant carried to the thread of the stream. The Kansas Supreme Court held that navigability in fact was the proper test, relying upon the decision of this Court in *The Genesee Chief,* 12 How. 443. Thus, the state court actually applied the federal rule. On the issue of navigability in fact, the state court took judicial notice that the river was so navigable, and refused evidence on the subject.

In this Court, Wear assigned as error the ruling upon the territorial statute, and also the action of the court in finding, by judicial notice, that the river was navigable in fact. This Court held that the territorial statute had not been erroneously interpreted, pointing out that it had been passed after the decision in *The Genessee Chief, supra*. The Court held further that the territorial statute, merely adopting the common law of England, could not be said to add to the grant of riparian lands a grant of the bed to the thread of the stream, for this "attributes too detailed and precise an effect to a general provision of law." 245 U. S. at 157. Compare the territorial statute here involved, *supra*, pp. 2–3. On the question of judicial notice, a procedural matter, this Court concluded that it could not pronounce it error "if a state court takes upon itself to know without evidence whether the principal river of the State is navigable at the capital of the State," and that "in this aspect" it was a question of state law (245 U. S. 158). Thus, as the Circuit Court of Appeals held (R. 150), the decision in *Wear* v. *Kansas*, was simply that, in the circumstances there presented, which included prior decisions by the state court of the same question, and a virtual concession of navigability in the pleadings, its navigability in fact was a proper subject for determination by judicial notice. In saying (p. 158) that "The fact is of a kind that should be established once for all,

not perpetually retried," the court obviously was not saying that the first determination of this federal question by a state court was thereafter conclusive.

Thus, this Court in the *Wear* case was dealing in terms of a river properly found, on the record presented, to be navigable *under the federal rule.* However, if it had been there acknowledged by Kansas that the state court determination was contrary to the fact, as Oklahoma here acknowledges the *Nolegs* decision to be erroneous, obviously a different question would have been before this Court.

This analysis of the *Wear* decision is confirmed by the subsequent decision of this Court in *Brewer Oil Co.* v. *United States,* 260 U. S. 77, 89. In language stressed by petitioners (Br. 45–46), the Court there stated:

> Some States have sought to retain title to the beds of streams by recognizing them as navigable when they are not actually so. It seems to be a convenient method of preserving their control. No one can object to it unless it is sought thereby to conclude one whose right to the bed of the river, granted and vesting before statehood, depends for its validity on non-navigability of the stream in fact. In such a case, navigability *vel non* is not a local question. In *Wear* v. *Kansas,* 245 U. S. 154, upon which the appellants rely, the patent of the United States under which

> Wear derived title was a grant, made before statehood, of land bordering on the Kansas River without restriction, reservation or expansion. The state tribunal took judicial notice of the navigability of the river, refused to hear evidence thereon, and held that the patent to land on a navigable stream did not convey the bed of the river. The United States by its unrestricted patent was properly taken to have assented to its construction according to the local law. Whether the local law worked its purpose by conclusively determining the navigability of the stream, without regard to the fact, or by expressly denying a riparian title to the bed of a nonnavigable stream, was immaterial. In either view the result there would have been the same. The case of *Donnelly* v. *United States,* 228 U. S. 243, is to be similarly distinguished, if, indeed, it can be said after the qualification of the opinion, 228 U. S. 708, 711, to require distinguishing.

In considering this language it should first be noted that the Court recognized that a State declaration of a non-navigable river as navigable could not conclude "one whose right to the bed of the river, granted and vesting before statehood, depends for its validity on non-navigability of the stream in fact." The United States and its Indian wards for whom it here sued fall exactly into that category (Point II, *infra*). The remainder of the quoted excerpt states a principle

with which we have no quarrel; *i. e.*, where the federal grant neither specifically grants nor withholds rights in the bed of the stream, it will be presumed that the intent of the United States was to have the grant construed under the applicable local law in order to determine whether the United States had conveyed its rights to its grantee or had retained the river bed. When reference is properly made to that law, it is of no consequence whether the law expressly denies river bed ownership to a riparian owner or accomplishes the same thing by treating the river as navigable, although it may not in fact be so. But the *Brewer Oil* case makes it clear that local law of this sort is properly controlling only if the federal grant is, in terms, inconclusive.[7] If the trust patents here involved be regarded as inconclusive, and reference be made to local law in this case to determine the rights of the Indian grantees, the controlling local law here is the law of the Oklahoma territory under which the Indians took to the thread of the river. See pp. 59–61, *infra*.

The *Wear* case is thus no authority at all for the proposition that a state judicial determination of navigability in a case to which the Government

[7] That the words "without restriction, reservation or expansion," used in the *Brewer Oil* case, p. 32, *supra*, were intended to describe a grant inconclusive on its face with respect to the bed of the adjacent waters, is indicated by the use of very similar language in *Hardin* v. *Jordan*, 140 U. S. 371, 384, in a context which makes this meaning even clearer.

is a stranger, and which is found by the federal courts, in subsequent litigation between the State and the United States, to be erroneous and contrary to the fact, and conceded by the State to be erroneous, is binding on the United States or its grantees and operates to give the bed of the river to the State. As said by this Court in *United States* v. *Oregon*, 295 U. S. 1, 27:

> * * * in no case has this Court held that a state could deprive the United States of its title to land under non-navigable waters without its consent, *or that a grant of uplands to private individuals, which does not in terms or by implication include the adjacent land under water, nevertheless operates to pass it to the State.* Whether, on any theory, such a result could be upheld was a question expressly reserved in *Hardin* v. *Shedd*, 190 U. S. 508, 519; *Whitaker* v. *McBride*, 197 U. S. 510, 515; *Marshall Dental Co.* v. *Iowa*, 226 U. S. 460, 462. [Italics supplied.]

And this Court there flatly rejected (pp. 28, 29) the argument that a State could so acquire title.

Moreover, *Oklahoma* v. *Texas*, 258 U. S. 574, was decided after the *Wear* case. As already noted (pp. 24–27, *supra*), the *Oklahoma* case is exactly in point here and specifically rejects petitioners' contention. The same court which decided *Oklahoma* v. *Texas*, decided the *Brewer Oil Co.* case in the same year, and as shown (p. 28, *supra*) cited the *Oklahoma* decision with approval.

Since petitioners' position here is irreconciliable with this Court's holding in *Oklahoma* v. *Texas,* it is idle to argue that anything said in the *Brewer Oil Co.* decision supports it.

Petitioners also rely upon the decision in *Donnelly* v. *United States,* 228 U. S. 243 (Br. 41). As intimated in the *Brewer Oil Co.* decision (260 U. S. 77, 89), so much of the *Donnelly* decision as related to the effect of state determinations of navigability was subsequently withdrawn in an opinion on rehearing, 228 U. S. 708. Passing this, however, the first *Donnelly* decision does not sustain petitioners' present assertion of a State's power to acquire title to the bed of a non-navigable stream by erroneously declaring or judicially determining it to be navigable. In the *Donnelly* case, a tribal reservation was created by executive order in 1891, after the admission of California to the Union. The reservation included "a tract of country one mile in width on each side of the Klamath River * * *" (228 U. S. p. 253). In connection with the question of federal jurisdiction over a crime committed on the river, the issue arose as to whether the bed of the river itself was part of the reservation. Donnelly insisted that the Klamath was a navigable river. The court reviewed the authorities which hold that the bed of a river navigable in fact belongs to the State. After stating that the question of "navigability in fact of non-tidal streams is sometimes a doubtful one," the Court

used the following language (228 U. S. p. 262) which is quoted and relied upon by petitioners (Br. 41):

> But it results from the principles already referred to that what shall be deemed a navigable water within the meaning of the local rules of property is for the determination of the several States.

But the language does not mean that a State can acquire the bed of a non-navigable river simply by characterizing the river as navigable. This is shown by what preceded this sentence (228 U. S. at pp. 261–262) and by the sentence immediately following, omitted by petitioners in their quotation, reading:

> Thus the State of California, if she sees fit, may confer upon the riparian owners the title to the bed of any *navigable* stream within her borders. [Italics supplied.]

The *Donnelly* case simply held that whether the river was navigable or non-navigable, the United States owned the bed thereof since if the river were navigable in fact California had elected to surrender the bed to riparian owners, and the United States was the sole riparian owner at the point in issue. The point of the discussion relied upon by petitioners was that States were free to retain the old English rule of navigability, restricting "navigable" waters to those that were tidal, and thus foregoing the State's rights to other non-tidal, but nevertheless navigable wa-

ters under the Federal test announced in *Genesee Chief* v. *Fitzhugh*, 12 How. 443. Cf. *Barney* v. *Keokuk*, 94 U. S. 324. There is nothing in the *Donnelly* decision to support the notion that a State, by declaring navigable a stream non-navigable in fact, can thereby acquire the bed.

The State of Kansas, in its brief as *amicus curiae* in this case, calls attention to such decisions as *United States* v. *Holt Bank*, 294 Fed. 161, 166 (C. C. A. 8), where the Circuit Court of Appeals, relying upon the *Donnelly* decision in this Court, held it was bound by the law of Minnesota on the question of navigability. But on appeal this Court held this to be erroneous. *United States* v. *Holt Bank*, 270 U. S. 49, 55–56. This Court there stated:

> Both courts below found that the lake was navigable. But they treated the question of navigability as one of local law to be determined by applying the rule adopted in Minnesota. We think they applied a wrong standard. Navigibility, when asserted as the basis of a right arising under the Constitution of the United States, is necessarily a question of federal law to be determined according to the general rule recognized and applied in the federal courts. *Brewer-Elliott Oil & Gas Co.* v. *United States, supra*, p. 87. To treat the question as turning on the varying local rules would give the Constitution a diversified operation where uniformity was in-

> tended. But nothwithstanding the error below in accepting a wrong standard of navigability, the findings must stand if the record shows that according to the right standard the lake was navigable.

This Court then proceeded to state the federal rule of navigability in fact to be applied. It is worthy of note that in that case the claim of the United States was likewise based on a holding of land in trust for sale for the benefit of Indian wards. However, this Court, finding that the lake was navigable in fact, held that the bed thereof passed to the State on its admission to the Union.

Kansas v. *Colorado*, 206 U. S. 46, also cited by Kansas (Br. 7, 9) is not helpful here. It did not involve title to the bed of the river, but the power of a State to regulate the use of the water on other than the common-law basis of equal use, two unrelated subjects. This Court said in *Oklahoma* v. *Texas*, 258 U. S. 574, 596, in answering a contention by Oklahoma that the common-law rule, by which the bed of a non-navigable stream passes with a grant of shore land, had been abrogated in Oklahoma:

> * * * It is based on statutes displacing or qualifying the common-law rule respecting the rights of riparian proprietors in the natural flow of a stream, which is a matter quite distinct from the ownership of the bed of the stream. The rule as to either could be displaced without affecting the other.

Kansas does not state expressly that the Arkansas River in Kansas is non-navigable in fact. If the river is navigable in fact, then the claim of Kansas to the bed is not in any wise affected by the decision below. If the river has always been non-navigable in fact, then Kansas never had any right to the bed. *Oklahoma* v. *Texas*, 258 U. S. 574, 591. If it is non-navigable in fact, it was error to find it navigable by judicial notice. Judicial notice embraces facts so well known that a court needs no evidence to prove them. It is not a blank check to courts to find facts which are non-existent. If the Kansas River is non-navigable in fact, then as a result of the state judicial determination mentioned in *Wear* v. *Kansas*, 245 U. S. 154, the State has appropriated property to which it never was entitled.

Kansas (Br. 10) urges that the decision below will lead to suits by riparian owners of lands along the river in that State, resulting in a confusion of titles. It is unnecessary in this case to speculate on the outcome of such litigation if it develops. Kansas cites no principle which requires that, if Kansas has mistakenly appropriated the bed of a river in that State, this Court is compelled to grant equally baseless rights to Oklahoma. The principle of equality upon which Oklahoma does and must rely entitles that State to the beds of navigable rivers only. There is no principle of equality among States to confiscate

the property of others. Oklahoma has no more interest in the bed of a nonnavigable river than in any other public lands in the State. Mineral wealth underlying dry public lands would not justify the State in asserting a property right in such land. The mineral wealth under the bed of the Arkansas River is the sole motivating interest in Oklahoma's effort to seize the bed. That interest does not create in the State a right, by a perversion of the test of navigability, to "destroy a title already accrued under federal law and grant * * *" or to "enlarge what actually passed to the State, at the time of her admission, under the constitutional rule of equality here invoked." *Brewer Oil Co.* v. *United States*, 260 U. S. 77, 88.

There remains for consideration, on this phase of the case, the Oklahoma Statute said by petitioners (Br. 3) to "reinforce" the *Nolegs* decision. That statute, 64 O. S. A. sec. 290 (p. 3, *supra*), enacted many years after all federal grants here in question had been executed, declares that all streams two chains or more in width are the property of the State. The Arkansas River at the points in question is in excess of that width (Fdg. IX, R. 61). This statute does not deal in terms of navigability. However that may be, and assuming it is a declaration of ownership of all streams of the class regardless of navigability, it cannot affect the title of the United States to the river bed at the points here involved.

Here again, the contention now advanced by petitioners has been specifically rejected by this Court. In *United States* v. *Oregon*, 295 U. S. 1, the state statute declared that the beds of lakes meandered by United States surveys were the property of the State. The lake there involved had been so meandered, but the court found it was nonnavigable in fact, and, in disposing of the claim of the State based upon the statute passed years after all conveyances there involved were executed, used the following language (pp. 28–29):

> The State, in making its present contention, does not claim as a grantee designated or named in any grant of the United States. It points to no rule ever recognized or declared by the courts of the State that a grant to individual upland proprietors impliedly grants to the State the adjacent land under water. The only support for its claim is the statute of 1921, adopted subsequent to every grant of the United States involved in the present case. *The case is not one of the reasonable construction of grants of the United States, but the attempted forfeiture to the State by legislative fiat of lands which, so far as they have not passed to the individual upland proprietors, remain the property of the United States.* Such action by the State can no more affect the title of the United States than can the similar legislative pronouncements that streams within

> a State are navigable which this Court has found to be non-navigable. See *Oklahoma* v. *Texas, supra; United States* v. *Utah, supra,* 75; *United States* v. *Holt State Bank, supra,* 55 56. [Italics supplied.]

It is thus settled by the decisions of this Court that a State may not by means of local judicial decisions or by local statutes appropriate to itself the beds of nonnavigable streams.

C. *The fact that the United States brought this suit on behalf of its Indian wards to whom trust patents had been issued does not enlarge the rights of the State of Oklahoma.*—As we will show in point II, *infra,* pp. 52–63, the trust patents issued to the Indian allottees conveyed to them the beneficial interest in the bed of the river where it abuts the allotments. However, whether the trust patents did so or not is essentially a matter which concerns only the United States and the Indians. Compare *Oklahoma* v. *Texas,* 258 U. S. 574, 596–597, where, in response to Oklahoma's contention that the Indian allotments had not been carried to final patents, the Court said: "Even if this were so, it may well be doubted that it would enable strangers to fasten any claim on or appropriate the bed in front of the allotments." Petitioners' argument that the trust patents did not embrace the river bed would be relevant only if their further contention that the mere issuance of the trust patents constituted a conveyance to the State of the river bed were

accepted. This latter argument clearly lacks merit. Petitioners rely (Br. 38) upon *Hardin* v. *Shedd*, 190 U. S. 508, to support this proposition. But for fear that such an argument would be later made, Mr. Justice Holmes in the *Hardin* opinion stated (p. 519):

> The rule as to conveyances bounded on non-navigable lakes does not mean that the land under such water also passed to the State on its admission or otherwise, apart from the Swamp Land Act, but is simply a convenient, possibly the most convenient, way of determining the effect of a grant. We are particular in calling attention to this difference, because we fear that there has been some misapprehension with regard to the point.

The claim advanced by the Government in this case is a claim of title in trust for its Indian wards. (R. 1–13). But this fact gives the State no right to challenge the Government's concession that its allottees have title to the bed unless different principles apply where the Government's claim of title is in trust for Indian wards than would apply if the Government's claim were of a title in itself free of any trust. That the United States would prevail where title wholly in itself is the basis of its claim is beyond question. *United States* v. *Utah*, 283 U. S. 64; *United States* v. *Oregon*, 295 U. S. 1. The district court so held (R. 64) and petitioners virtually concede this (Br. 47). The same rule that navigability in fact

is controlling, applies where the United States holds property in trust for Indian Tribes or allottees. *United States* v. *Holt Bank*, 270 U. S. 49; *Brewer Oil Co.* v. *United States*, 260 U. S. 77, 81; *Oklahoma* v. *Texas*, 258 U. S. 574. In the two cases last cited, the rule of navigability in fact was held to control notwithstanding prior state court adjudications (in cases to which neither the United States nor its wards were parties) that the river was navigable.

In *Oklahoma* v. *Texas* the United States claimed the title of the south half of the river bed for itself and portions of the north half in trust for Indian allottees. The claim of Oklahoma based upon the erroneous state judicial determination of navigability was rejected as to the entire river bed, no distinction being made as to the capacity in which the United States was asserting the claim. This decision is, we submit, conclusive that, contrary to petitioners' assertions (Br. 47–49), the State has no greater rights against the United States as trustee for Indian allotees than it does against the United States itself. The fact, emphasized by petitioners (Br. 48–49) in attempting to distinguish the *Oklahoma* decision, that the Indian tribal reservation, prior to allotment, was expressly bounded by the "middle of the main channel" of the river was irrelevant as far as Oklahoma's claim based upon its admission to the Union was concerned and was important only

in determining the rights of grantees of the United States.

Petitioners seek (Br. 47) to escape the effect of this Court's decision in *Brewer Oil Co.* v. *United States,* on the ground that the grant to the Osage Nation expressly included the river bed. But the attempted distinction is invalid. The fact that the grant was express with respect to the river bed simply removed from the case any question as to the intent of the United States in making the grant. As previously noted (*supra,* p. 28) because of the express grant, Oklahoma was committed to argue (1) an absolute lack of power in the United States to convey the bed of a navigable water, and alternatively (2) a lack of power to make such a conveyance for the purpose which prompted the grant to the Osage Nation. Both of these challenges were based upon the same claim now made, that the State acquired title, upon its admission to the Union, to the beds of navigable streams. This Court stated (260 U. S. at p. 86):

> We do not find it necessary to decide either of these questions, in view of the finding as a fact that the Arkansas is and was not navigable at the place where the river bed lots, here in controversy, are.

In so ruling this Court necessarily disposed of petitioners' present argument. They here contend that, since the State Supreme Court has once decided that the river was navigable, the courts

below and this Court are bound by the determination. If that were so, this Court could not have so avoided the questions raised by Oklahoma in the *Brewer Oil Co.* case, since it would have followed that this Court had to treat the river as navigable and deal with the power of the United States to convey the bed.

These decisions establish the proposition that property, or claims of title to property asserted by the United States on behalf of its dependent Indian wards, are unaffected by prior state court determinations of navigability. Moreover, it may be noted that, even where different issues are involved, property held by the United States in trust for Indian wards is accorded the same immunity from State action as is property held beneficially by the United States. Thus a State can not, without Congressional consent, condemn property held by the United States under trust patents for its Indian allottees. *Minnesota* v. *United States,* 305 U. S. 382. There this Court recognized (fn. 1, p. 386) that such a title in the United States "is not a dry legal title divorced from substantial powers and responsibilities with relation to the land." Cf. *Town of Okemah* v. *United States,* 140 F. 2d 963 (C. C. A. 10), where the fee was in the Indian subject to federal restraints on alienation. Similarly, the State can not, absent Congressional consent, bring the taxing power to bear upon such lands. *United States* v.

Rickert, 188 U. S. 432; *United States* v. *Board of Com'rs of Fremont County, Wyo.,* 145 F. 2d 329 (C. C. A. 10), certiorari denied, 323 U. S. 804. Thus, even where the most vital State powers are concerned, the power to condemn and the power to tax, the principles and immunities applicable to property beneficially owned by the United States have been recognized as affording the same protection where the Government's title is in trust for its dependent Indian wards.

As the decisions hereinbefore reviewed show, whether the United States asserted title to land beneath waters in its own behalf or on behalf of its Indian wards, this Court has in every instance recognized navigability in fact as the controlling factor, and this notwithstanding state court determinations of navigability. Petitioners cannot cite an instance to the contrary.

D. *The decision in* State *v.* Nolegs *is not conclusive as a rule of property.*—Petitioners contend (Br 62) that the local decision in *State* v. *Nolegs* constitutes a rule of property and is, therefore, conclusive that the Arkansas River is navigable throughout Oklahoma. Certainly any "rule of property" resulting from general acceptance of the *Nolegs* decision could not operate retroactively to deprive persons of titles vested long prior to that decision (see *infra,* pp. 61–63). That decision purported merely to find the fact of navigability and did not enunciate any new principle of law.

In fact, Oklahoma was twice advised that local decisions do not have the effect now sought to be given the *Nolegs* case.

In *Oklahoma* v. *Texas*, 258 U. S. 574, this Court held the Red River to be nonnavigable in fact despite an earlier contrary decision in *Hale* v. *Record*, 44 Okla. 803, 146 Pac. 587, and held that the State did not have title to the bed by virtue of its admission to the Union. And when, in *Brewer Oil Co.* v. *United States*, 260 U. S. 77, this Court affirmed the finding of the lower courts that the Arkansas River was not navigable in fact above its confluence with the Grand River[*] (249 Fed. 609, 623), notwithstanding the prior decision in *State* v. *Nolegs*, it follows that Oklahoma and the world understood that she had no title to any part of the river bed above that point as to which she had received no grant.

Thus, the decree in the *Brewer Oil Co.* case established a rule of property under which conveyances have been made during the past twenty-five years. In Glassmire, *Law of Oil and Gas Leases* (1938 Ed.) at page 265, it is stated:

> On the contrary, in the adjoining state of Oklahoma there has been much litigation during the past fifteen years over the river beds of the Arkansas, Red, Cimarron and Canadian Rivers, which has finally been

[*] The lands here in suit are on the opposite shore of the Arkansas River (R. 62) at approximately the same point above its confluence with the Grand River.

> determined against the state and in favor of the riparian owners, the Oklahoma courts having taken judicial notice that such streams, and tributaries thereof, were not navigable in fact.

And after citing the *Brewer-Elliott* litigation the same authority states (p. 265):

> * * * Under this general rule of nonnavigability in fact, the bed of the Arkansas River in the Cherokee and Creek Nations also belongs to the present riparian owners.

Moreover, Oklahoma itself recognized the *Brewer-Elliott* adjudication as a rule of property. In *United States* v. *Hayes*, 20 F. 2d 873 (C. C. A. 8) ownership of portions of the Arkansas River was in issue, rival claimants being the Creek Tribe, on the one hand, and Creek allottees holding patents covering riparian lands and silent on the question of the river bed. The State of Oklahoma intervened. The opinion of the court (p. 876) states:

> At first, this was a triangular contention in which there were three classes, each of which claimed an exclusive title. These were the Creek Nation, the state of Oklahoma and the owners (or their lessees) of the adjacent shore lands. During this litigation, the Supreme Court decided a case (*Brewer Oil Co.* v. *United States*, 260 U. S. 77, 86, 43 S. Ct. 60, 67 L. Ed. 140), which determined the nonnavigable character of the Arkansas river above the mouth

> of the Grand river. As the lands here involved were above the mouth of the Grand river, that decision eliminated the state of Oklahoma as a claimant. The state recognized this situation by filing a formal stipulation that a decree might be taken against it.

In that case, as here, title to the bed was awarded to Indian allottees whose allotments contained "no express grant nor express reservation of the lands in the river beds" (20 F. 2d 877). Thus petitioners can not explain away the State's disclaimer in the *Hayes* case on the ground that there was an express grant of the river bed. That is the basis on which they try to limit the decision in the *Brewer Oil Co.* case (Br. 47), previously examined and shown to be invalid (pp. 45–46, *supra*).

Further evidence that Oklahoma fully understood the effect of this Court's decisions in the *Oklahoma* v. *Texas* and *Brewer Oil Co.* cases is found in the fact that, although the presence of mineral wealth beneath the bed of the Arkansas River at the precise point here involved gave rise to the *Brewer Oil Co.* litigation, and thus was known to the State at least twenty-five years ago, the State made no attempt to assert title to the south half of the bed until 1942, when it executed the leases which precipated this litigation (R. 13–20).

Finally the Supreme Court of Oklahoma itself, in *Vickery* v. *Yahola Sand & Gravel Co.*, 158

Okla. 120, 12 P. 2d 881, has recognized that, as a result of the decision in the *Brewer Oil Co.* case, insofar as the Arkansas River above its confluence with the Grand River is concerned, the decision in *State* v. *Nolegs* is not the law in Oklahoma. The court was there dealing with the river at a point below the confluence of the Arkansas and the Grand River, but the court stated (12 P. (2d) at 882):

> It is contended that the decision in the *Nolegs Case* is no longer the law in Oklahoma. That the same question was involved in *United States* v. *Brewer-Elliott Oil & Gas Co.*, in the District Court for the Western District of Oklahoma, 249 F. 609, 610, affirmed by the United States Circuit Court of Appeals, *Brewer-Elliott Oil & Gas Co.* v. *United States*, 270 F. 100, and by the Supreme Court of the United States, 260 U. S. 77, 43 S. Ct. 60, 67 L. Ed. 140, and in subsequent cases, wherein the federal courts refused to follow the *Nolegs Case*.
>
> This is undoubtedly true as to the holding that the court takes judicial notice that the Arkansas river is navigable through its course in Oklahoma.

Petitioners seek to overcome this by arguing (Br. 51) that the Court there held that the *Nolegs* decision has never been repudiated. But the language relied upon does not support this. What the Court held is that the *principle* that a State owns the beds of *navigable* streams has

never been repudiated. Conceding this principle, the Government insists that it can not be expanded, at the will of the State, to include the beds of streams not navigable in fact.

There is thus not only an entire lack of basis for petitioners' claim that a rule of property evolved from the *Nolegs* decision, but it clearly appears that the rule of property is adverse to the present pretensions of petitioners.

II

THE TRUST ALLOTMENT PATENTS ISSUED BY THE UNITED STATES TO ITS DEPENDENT INDIAN WARDS EMBRACED THE BED OF THE RIVER AND OKLAHOMA CANNOT RETROACTIVELY DIVEST SUCH TITLE

We have shown in point I, *supra,* that Oklahoma has no property right in the bed of the Arkansas River. The United States and its Indian wards are agreed that the patents to the allottees gave them the beneficial interest in the river bed. Petitioners' argument that this is not so does not, even if true, establish an interest of Oklahoma in the river bed (see *supra,* p. 43). In addition, as we shall now show, the contention lacks merit.

A. *The trust patents embraced the bed of the river.*—The trust patents issued by the United States to its Indian wards (R. 100–106) in express terms covered riparian lands on the south bank of the Arkansas River, and "the bed of the Arkansas River itself was neither expressly in-

cluded or excluded from the lands set aside for the Indians" (Fdg. V, R. 61). Here again *Oklahoma* v. *Texas*, 258 U. S. 574, is precisely in point. In that case, the Government asserted title on behalf of Indian allottees to portions of the north half of the river. There, as here, the lands were surveyed and meandered, but the township and sectional lines were not extended across the river (p. 585); the disposals were made according to the legal subdivision established by the survey and shown on the official plat and "In the patents there was no express inclusion or exclusion of rights in the river bed" (p. 595). The only difference between that case and this lies in the fact that, whereas all the trust patents in this case were issued prior to the admission of Oklahoma into the Union, there the trust patents issued in 1909 and 1910, after admission of the State (p. 596). In declaring the rule for the construction of the trust patents there involved, this Court stated (258 U. S. at pp. 594–595):

> Where the United States owns the bed of a nonnavigable stream and the upland on one or both sides, it, of course, is free when disposing of the upland to retain all or any part of the river bed; and whether in any particular instance it has done so is essentially a question of what it intended. If by a treaty or statute or the terms of its patent it has shown that it intended to restrict the conveyance to the upland or to that and a part only of the river bed, that

> intention will be controlling; and, if its intention be not otherwise shown, it will be taken to have assented that its conveyance should be construed and given effect in this particular according to the law of the State in which the land lies. Where it is disposing of tribal land of Indians under its guardianship the same rules apply.

In *Oklahoma* v. *Texas, supra,* after finding the river to be nonnavigable in fact, this Court determined that the patents there involved carried title to the river bed, first, because the antecedent Congressional policy revealed an intention to part with the river bed along with the shore lands, and second, on the entirely independent and alternative ground that the patents had such effect under the local law in force when the Government made the grants—in that case the law of the State of Oklahoma since the patents there issued after the State was admitted to the Union.

So here, the Government submits, first, that the history preceding the issuance of the trust patents reveals an intention on the part of the United States to part also with the river bed,[9] and secondly, that the trust patents had that effect by virtue of the local law obtaining at the time of the issuance of the patents.

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[9] The United States also made this contention in the Circuit Court of Appeals. That court, however, in holding that the patents carried title to the bed under local law, did not find it necessary to pass upon this question.

1. *The trust patents were issued pursuant to a broad Congressional policy which shows an intention to convey the river bed along with the riparian lands.*—By Article XVI of the Treaty of July 19, 1866, 14 Stat. 799, the Cherokee Nation agreed that the United States might settle friendly Indians in the Cherokee country west of 96°. This area became known as the Cherokee Outlet (Fdg. III (c), R. 57–58), and embraced lands on both sides of the Arkansas River at the points here in question. The treaty also provided that the Cherokee Nation would convey the lands so selected and utilized by the United States. The first implementation of this policy by the United States was in the following year when, by the Treaty of October 28, 1867, 15 Stat. 593, 594, a reservation was set up for the Cheyenne and Arapahoe Tribes. Since the area was not surveyed until September 16, 1872 (Fdg. VI, R. 61), the reservation was described by natural boundaries, and consisted of all lands south of the 37th parallel of north latitude which lay between the Cimarron and the Arkansas Rivers. These rivers formed the west and east boundaries and the grant was expressly extended to the middle of these rivers. This reservation included the riparian lands and abutting portions of the river bed now in question. The Cheyenne and Arapahoe Tribes declined this reservation and relinquished their claim. H. R. Ex. Doc. No. 89, 47th Cong., 1st sess. (Fdg. III (d), R. 58). However,

this action shows that, in executing the policy for which the United States acquired rights in these lands from the Cherokee Nation, the Government intended to include the river bed within the grant to the Indians to be settled on such lands.

The same intention was manifested when, on June 5, 1872 (again before any survey was available), the United States confirmed to the Osage Nation a tract of land "Bounded * * * on the south and west by the north line of the Creek Country and the main channel of the Arkansas River * * *." 17 Stat. 228–229. This grant included the land on the opposite side of the river at approximately the same point as is here involved (R. 62), and the title of the United States to the north half of the river bed, in trust for the Osage Nation, was upheld in litigation between the United States and Oklahoma. *United States* v. *Brewer-Elliott Oil & Gas Co.*, 249 Fed. 609 (W. D. Okla.), affirmed, 270 Fed. 100 (C. C. A. 8), affirmed, 260 U. S. 77. Thus in both instances prior to the availability of survey descriptions, the United States expressly included the bed of the Arkansas River.

The official survey was approved on September 16, 1872, and the subsequent dispositions and grants to the Pawnees and to the Otoes and Missourias were, as already shown (pp. 5–10, *supra*), by such survey descriptions, the riparian lands here involved being conveyed as parts of

fractional townships. It was a thoroughly natural practice to utilize the survey descriptions.[10] As a result no express mention of the river bed is contained in these subsequent executions of the broad settlement policy already outlined. It is submitted that these later grants should be construed in the light of the policy of the United States manifested in the earlier settlements at a time when natural boundaries had to be resorted to. There is no reason to suppose that the Government intended to deal less generously with the Pawnees and Otoes than it had previously dealt with the Cheyennes, the Arapahoes, and the Osages. On the contrary, it seems quite clear that, if resort to natural boundaries had been necessary in 1876 and 1881, when the grants to the Pawnees and Otoes were made, the Government would, as in the case of the Cheyennes and the Osages, have bounded the reservations by the main channel of the river.

It is accordingly submitted that the history, of which the grants to the Pawnees and the Otoes, and later the trust patents, were but parts, affirm-

[10] It is interesting to note that, while the Act of June 5, 1872, 17 Stat. 228–229, creating the Osage Reservation, expressly bounded it by the main channel of the Arkansas River, the deed from the Cherokee Nation to the United States, executed pursuant to that act and after the survey had been completed, did not make the main channel of the river the boundary, but described the lands as "fractional townships being on the left bank of the Arkansas River," *Brewer-Oil Co.* v. *United States*, 260 U. S. 77, 82.

atively shows an intent on the part of the Government to include the bed of the river in all these grants.

2. *The trust patents embraced the bed of the river under the local law in force in the Oklahoma Territory at the time the patents were issued.*— Even if the history preceding the issuance of the trust patents did not justify a finding of intent to include the river bed, such intent is ascertained when resort is had to the other rule of construction announced by this Court in *Oklahoma* v. *Texas*, 258 U. S. 574, 594–595—construction according to the local law. In that case, this Court stated that the grants will be construed according to the law of the State in which the land lies to determine whether the United States intended to dispose of the river bed or intended to retain it.

This Court there spoke in terms of the law of the State simply because the trust patents there in issue were granted after Oklahoma had become a State. Where, as here, the grants were made before the formation of a State, the law with reference to which the grant must be construed is the local law in force in the territory where the land is situated. *United States* v. *Elliott*, 131 F. 2d 720, 723 (C. C. A. 10). This is so because the theory of the rule is that the local law was in contemplation by the United States when it made the grants and that the Government assented to their construction according to that law.

It should be noted that this principle of construction is not based upon any sovereign right of the State or local government. Since the beds of nonnavigable streams are the property of the United States, it is for the United States alone to say whether it will grant them to riparian grantees of the Government or retain them. *United States* v. *Oregon*, 295 U. S. 1, 27–28. State or local law, as applied in construing such grants, accordingly does not operate as state law, but as adopted federal law. In the *Oregon* case (295 U. S. 1, 28) this Court stated:

> In construing a conveyance by the United States of land within a State, the settled and reasonable rule of construction of the State affords an obvious guide in determining what impliedly passes to the grantee as an incident to land expressly granted.

And if by local law the bed of a nonnavigable stream does not pass to the grantee of the shore land, it remains the property of the United States. (*Ibid*, p. 29).[11]

Accordingly, the Circuit Court of Appeals applied the local law in effect in the Oklahoma Ter-

[11] Petitioners argue (Br. 17–36), without citation of authority, that title to the river bed did not pass from the Cherokee Nation under the deeds in trust for the Pawnees and Otoes, but became public domain of the United States under the cession by the Cherokee Nation under the Agreement of December 19, 1891, 1 Kappler, *Indian Affairs, Laws and Treaties*, pp. 490–492. The argument is unsound. The language relied upon in both deeds clearly makes the river

ritory when these grants were made—that being the law in existence at that time which affords the "obvious guide" to the intention of the United States. The law in the Oklahoma Territory was embodied in Section 4173, St. 1890, enacted by the Territorial Legislature and reading, so far as here material, as follows:

> * * * In all cases, where the opposite banks of any streams not navigable belong to different persons, the stream and the bed thereof shall become common to both.

This statute adopts the identical language of Section 6 of the Act of June 1, 1796, 1 Stat. 490–491, R. S. 2476, 43 U. S. C. 931, construed in *Railroad Company* v. *Schurmeir,* 7 Wall. 272, 287–289, as embodying the common law rule that a grant of shore land on a non-navigable stream carries title to the thread of the stream and in-

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the boundary, and both deeds were according to annexed plats which show the river as the boundary. Hence the thread of the river is the limit of the grant. *Railroad Company* v. *Schurmeir,* 7 Wall. 272, 287; *Hardin* v. *Jordan,* 140 U. S. 371, 379–380. Similarly recitations of the acreage of the shore land do not exclude the bed. *Railroad Company v. Schurmeir, supra;* cf. *United States* v. *Hayes,* 20 F. 2d 873 (C. C. A. 8); *Faulks* v. *Schrider et al.,* 99 F. 2d 370, 373 (App. D. C.). The matter need not be further pursued since it is irrelevant. Even if the Government held the bed as public domain at the time it issued the trust patents, rather than as tribal lands, this creates no title or other interest in the State. And the same local law is resorted to in construing the patents regardless of whether the Government was disposing of public land or tribal land. *Oklahoma* v. *Texas,* 258 U. S. 574, 594–595.

cludes the river bed. See also *Brewer Oil Co.* v. *United States,* 260 U. S. 77, 86–87. Thus the allotment patents here in question, all of which were issued during the existence of Oklahoma Territory, carried title to the south half of the river bed adjacent to the shore lands covered by the patents, by reason of the local law.

While the law of Oklahoma as a State is irrelevant, since it cannot constitute a guide to the intention of the United States in making grants prior to the State's existence, it may be noted that the common-law rule applies also in Oklahoma. *Oklahoma* v. *Texas,* 258 U. S. 574, 596; *Hale* v. *Record,* 44 Okla. 803, 146 Pac. 587; *Anderson-Pritchard Oil Corp.* v. *Key Okla. Oil Co.,* 149 Okla. 262, 299 Pac. 850; *Hunzicker* v. *Kleeden,* 161 Okla. 102, 17 P. 2d 384. In *Oklahoma* v. *Texas, supra,* this Court held that trust patents issued in 1909 and 1910 embraced the bed of the Red River by reason of Oklahoma law. And if the law of Oklahoma had any bearing here, it follows that title to the river bed vested under the trust patents even under state law at least as early as 1909 and 1910, long before the erroneous decision in the *Nolegs* case or the 1919 statute relied upon by petitioners.

B. *Oklahoma could not retroactively appropriate the river bed, the beneficial interest thereto having already vested in the Indian allottees.*— It is elemental that Oklahoma upon its subsequent

admission as a State could not, by an erroneous judicial determination of navigability or by legislative fiat, divest the United States or its Indian wards of the title previously vested. *Brewer Oil Co.* v. *United States,* 260 U. S. 77, 87; *United States* v. *Oregon,* 295 U. S. 1, 28, 29. In the *Brewer Oil* case, this Court, speaking of a grant prior to statehood, said (260 U. S. pp. 87–88):

> In such a case as this the navigability of the stream is not a local question for the state tribunals to settle. The question here is what title, if any, the Osages took in the river bed in 1872 when this grant was made, and that was thirty-five years before Oklahoma was taken into the Union and before there were any local tribunals to decide any such questions. As to such a grant, the judgment of the state court does not bind us, for the validity and effect of an act done by the United States is necessarily a federal question. The title of the Indians grows out of a federal grant when the Federal Government had complete sovereignty over the territory in question. Oklahoma when she came into the Union took sovereignty over the public lands in the condition of ownership as they were then, and, if the bed of a non-navigable stream had then become the property of the Osages, there was nothing in the admission of Oklahoma into a constitutional equality of power with other States which required or permitted a divesting of

> the title. It is not for a State by courts or legislature, in dealing with the general subject of beds of streams, to adopt a retroactive rule for determining navigability which would destroy a title already accrued under federal law and grant or would enlarge what actually passed to the State, at the time of her admission, under the constitutional rule of equality here invoked.

And in *United States* v. *Oregon*, 295 U. S. 1, 29, this Court referred to a state statute, similar to the 1919 Oklahoma statute relied upon here, as an "attempted forfeiture to the State by legislative fiat of lands which, so far as they have not passed to the individual upland proprietors, remained the property of the United States."

There is another barrier to the attempted appropriation by the State of the river bed. The Oklahoma Enabling Act, 34 Stat. 267, 270, sec. 3, provides:

> That the people inhabiting said proposed State do agree and declare that they forever disclaim all right and title in or to any unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian, tribe, or nation.

This provision of the Enabling Act is binding on the State. *Coyle* v. *Oklahoma*, 221 U. S. 559, 574; cf. *Ex Parte Webb*, 225 U. S. 663, 690–691; *United States* v. *Sandoval*, 231 U. S. 28, 38.

CONCLUSION

It is respectfully submitted that the judgment of the circuit court of appeals should be affirmed.

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